Supreme Court, U.S.
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No. 08-1424

IN THE

Supreme Court of the United States

LOUIS R. ROSENTHAL,

Petitioner,

v.

COMMITTEE ON PROFESSIONAL STANDARDS, APPELLATE DIVISION, SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons for this Court to grant the Petition when the only asserted error involves erroneous factual findings and the misapplication of a properly stated court rule by the New York State Supreme Court, Appellate Division, Third Department, in its decision determining that since no issues of fact were presented with respect to Petitioner's attorney disciplinary matter, no hearing was warranted under the circumstances.

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INTRODUCTION

At the outset, Petitioner has presented no "compelling reasons" for his Petition for a Writ of Certiorari to be granted ("Petition"). See Sup. Ct. R. 10. It is clear that Petitioner is dissatisfied with the decision by the New York State Appellate Division, Third Judicial Department suspending him from the practice of law for two years. *Matter of Rosenthal*, 57 A.D.3d 1085 (3rd Dept. 2008). The entire record of Petitioner's disciplinary case stems from his misconduct while he served as former Kings County Counsel to the Public Administrator from 1997 to 2002. In his Petition, Petitioner raises irrelevant and self serving facts that have no bearing on the ultimate issues that he charged and collected excessive fees while serving as counsel to the public administrator, failed to properly discharge his office and handled legal matters associated with that office without preparation adequate under the circumstances. *See*, New York Lawyer's Code of Professional Responsibility, DR's 2-106(A)&(C)(3) (22 NYCRR § 1200.11) and 6-101(A)(2)(22 NYCRR § 1200.30). There has been no showing that the New York State Supreme Court, Appellate Division, Third Department abused its discretion in its decision resolving facts against Petitioner which obviated the need for a hearing. Petitioner's constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution to the United States were not implicated by the Appellate Division decision.

An important point for this Court to consider is that the Respondent Committee on Professional Standards served Petitioner with a motion pursuant to 22 NYCRR

§ 806.5 seeking an order determining that no factual issues were raised in Petitioner's disciplinary proceeding. That motion is the equivalent of a motion for summary judgment in a civil matter and the rule provides in relevant part, "The court shall refer issues of fact to a judge or referee to hear and report. If no factual issue is raised, the court may, upon application of either party, fix a time at which the attorney may be heard in mitigation or otherwise, or the court may refer the matter for such purpose." Respondent's 806.5 motion annexed evidence and exhibits supporting the disciplinary charges which included Petitioner's sworn testimony before the New York State Commission on Judicial Conduct in a proceeding to remove former Kings County Surrogate Michael H. Feinberg. Although Petitioner was not a party to that proceeding, he appeared as a witness and his testimony revealed that while he served as Kings County Counsel to the Public Administrator from 1997 to 2002 he (1) failed to comply with New York State Surrogate's Court Procedure Act § 1108(2)(c); (2) only started to do so when he learned his systematic failure was being reported in the New York Daily News; (3) began to prepare nunc pro tunc affidavits after the fact; and (4) failed to properly review the Surrogate's Court Procedure Act when he assumed his position. The evidence presented to the Appellate Division established that Petitioner charged and collected excessive fees in contravention of Surrogates Court Procedure Act § 1108(2)(c) by failing to submit affidavits of legal services specifically required by that statute and failed to properly handle all legal matters associated with his position as counsel to the public administrator. It is submitted that the Appellate Division considered all evidence and appropriately determined

that no factual issues were presented which warranted the appointment of a referee to hear testimony and report to the Court. Petitioner was granted the opportunity to appear before the Appellate Division and in fact did so on October 7, 2008 to explain his conduct and present mitigation. All aspects of procedural due process were complied with, including adequate notice of the charges, a neutral decision maker concerning his conduct, right to counsel, right to a decision based upon the record with stated reasons for the decision and opportunity to be heard before the Appellate Division. There was no denial of Petitioner's right to a hearing under the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

New York Code of Rules and Regulations 22 NYCRR Part 806 governs the Conduct of Attorneys in the New York State Supreme Court, Appellate Division, Third Judicial Department. 22 NYCRR § 806.2 Professional Misconduct Defined provides:

> Any attorney who fails to conduct himself or herself in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law, and any attorney who violates any Disciplinary Rule of the Code of Professional Responsibility adopted jointly by the Appellate Divisions of the Supreme Court, effective September 1, 1990, or any other rule or announce standard of the court governing the conduct of attorneys, shall be deemed guilty of professional conduct with

> meaning of subdivision 2 of section 90 of the Judiciary Law. that an attorney who fails to conduct himself or herself in conformity with the standards of conduct imposed upon members of the bar and who violates any Disciplinary Rule of the Code of Professional Responsibility shall be deemed to be guilty of professional misconduct with meaning of subdivision 2 of section 90 of the New York State Judiciary Law.

By order dated May 23, 2005 the Appellate Division, Second Judicial Department transferred a sua sponte inquiry commenced by the Grievance Committee of the Second and Eleventh Judicial District to the Appellate Division, Third Department. Petitioner was requested by Respondent to respond to the allegation that from January 1997 to May 2002 while he served as Kings County Counsel to the Public Administrator he failed to comply with New York State Surrogate's Court Procedure Act § 1108 which required him to submit affidavits of legal services detailing time spent and work performed by him on each file and the method he arrived at in calculating and seeking fees. Further, Petitioner was requested to respond to the allegation that he requested and received excessive fees since he failed to comply with Surrogate's Court Procedure Act § 1108(2)(c) and failed to properly discharge his position as Kings County Counsel to the Public Administrator. Petitioner responded to the allegations and was provided notice and an opportunity to present his position.

After conclusion of Respondent's investigation, on December 13, 2007 Respondent served Petitioner with disciplinary charges pursuant to 22 NYCRR § 806.5. That provision provides:

> Upon determining that a disciplinary proceeding should be instituted, the committee shall file with the court the original and one copy of the notice of petition and petition of charges with proof of service of a copy upon the attorney. Service of the notice and petition shall be made either personally or by certified mail. If service is made by certified mail and he attorney shall fail to answer or respond within the time specified by the notice, a copy of the notice and petition shall be served upon the attorney personally. The court shall refer issues of fact to a judge or referee to hear and report. If no factual issues are raised, the court may, upon application of either party, fix a time at which the attorney may be heard in mitigation or otherwise, or the court may refer the matter for such purpose.

Charge I of the petition of charges alleged that in his capacity as Kings County Counsel to the Public Administrator, Petitioner violated Disciplinary Rules 2-106(A) and (C)(3) (22 NYCRR § 1200.11) of the New York Lawyer's Code of Professional Responsibility by charging and collecting excessive fees as Kings County Counsel to the Public Administrator, as he failed to comply with Surrogates Court Procedure Act § 1108(2)(c) from 1997 to 2002. The charge further

alleged that due to his systematic failure to comply with this statute from 1997 to 2002 he received $8,613,099.35. Finally, it was alleged that in May 2002 after he learned that an article was to appear in the New York Daily News concerning his receipt of excessive fees, Petitioner met with the Surrogate who directed him to submit affidavits, *nunc pro tunc*, detailing work he performed between 1997 and 2002. Charge II of the Petition of Charges alleged that Petitioner violated Disciplinary Rule 6-101(A)(2) (22 NYCRR § 1200.30) of the New York Lawyer's Code of Professional Responsibility by handling matters without preparation adequate under the circumstances. It was alleged that after he was appointed as Kings County Counsel to the Public Administrator in 1997 he failed to properly discharge his office or review his statutory obligations under New York Surrogate's Court Procedure Act § 1108(2)(c). Petitioner regularly requested a six percent fee drawn from an estate when he filed an accounting with the court and then requested an additional two percent fee from the gross value of the estate when he submitted a final decree to the court. The total fee he requested in which he acted as counsel to the public administrator was eight percent of the appreciated value of the estate at the time of the final decree. Petitioner submitted his fee requests on post-it notes rather than by filing affidavits of legal services.

By answer dated January 26, 2008 petitioner denied both charges. On February 27, 2008 Respondent served Petitioner with a motion pursuant to 22 NYCRR 806.5 of the Rules of the Appellate Division, Third Department seeking an order declaring no factual issues were raised which warranted referral of the matter to a

referee for a fact finding hearing. The motion included Petitioner's sworn testimony before the New York State Commission on Judicial Conduct on January 8, 2004 in a proceeding to remove Kings County Surrogate Michael H. Feinberg. Petitioner's testimony and the admissions he made in that proceeding fully supported the two disciplinary charges. Petitioner submitted written opposition to the motion on March 14, 2008. On August 25, 2008 the Appellate Division, Third Judicial Department granted Respondent's motion and on October 7, 2008 Petitioner appeared before the Appellate Division, Third Department and was provided the opportunity to present his position and mitigation. By decision dated December 4, 2008 the Appellate Division determined that Petitioner charged and collected excessive fees in contravention of Surrogate's Court Procedure Act § 1108(2)(c), failed to properly discharge his office as Kings County Counsel to the Public Administrator and handled legal matters without adequate preparation for over a five year period. Petitioner was suspended from the practice of law for two years.

By decision dated February 17, 2009 the New York State Court of Appeals denied Petitioner's motion for leave to appeal and for a stay pending appeal based upon Petitioner's claim that the Appellate Division decision violated his right to a hearing as guaranteed by the due process clause of Article 1, § 6 of the New York State Constitution and the due process clauses of the Fifth and Fourteenth Amendment to the Constitution of the United States.

REASONS FOR DENYING THE PETITION

The decisions of the Appellate Division, Third Department and New York State Court of Appeals were correct and do not amount to denial of Petitioner's right to a hearing as guaranteed by due process clauses under the Fifth and Fourteenth Amendments to the United States Constitution.

A. The Appellate Division, Third Judicial Department's decision declaring that no factual issues were raised as part of Petitioner's disciplinary case was properly decided and based upon evidence presented to the court by both Petitioner and Respondent.

Under the New York statutory scheme, the Appellate Division is granted exclusive power to remove from office any attorney who is guilty of professional misconduct. New York Judiciary Law § 90.

Petitioner was served with detailed disciplinary charges notifying him of what section of the New York Code of Professional Responsibility it was alleged he violated. He was also apprised what specific conduct on his part constituted a violation of the New York Code of Professional Responsibility. Petitioner served an answer denying the charges and was represented by counsel at the investigatory stage and before the Appellate Division and Court of Appeals.

Petitioner asserts that comparison of the two disciplinary charges and his answers thereto demonstrated that there were issues of fact which

warranted a hearing. In response to the charge that Petitioner charged and collected excessive fees in violation Disciplinary Rule 2-106(A)&(C)(3) (22 NYCRR § 1200.11) of the Code of Professional Responsibility and Surrogates Court Procedure Act § 1108(2)(c) by failing to submit affidavits of legal services from 1997 to 2002, his answer stated:

> At best it was a technical error which was cured by respondent's filing of nunc pro tunc affidavits. . . In so far as this charge alleges respondent "collected" excessive fees in contravention of SCPA § 1108(2)(c) and thus violated DR 2-106 (A). . . That disciplinary rule is intended to apply to situations where a lawyer is dealing directly with a private client. . . The responsibility for determining whether the fee should be awarded in the absence of an affidavit of legal services was the Court's responsibility, not respondent's. . . Assuming arguendo the above defense is not sustained, the respondent admits he was awarded fees as the PA's counsel in the absence of an affidavit of legal services in violation of § 1108(2)(c).

In response to the second charge that Petitioner handled legal matters without adequate preparation under the circumstances in violation of Disciplinary Rule 6-101(A)(2) (22 NYCRR § 1200.30) of the Code of Professional Responsibility, his answer stated:

> Respondent informed himself of that section (SCPA § 1108(2)(c) and was prepared to follow

it but was given bad advice by experienced attorneys whom he hired from Hesterberg & Keller, his predecessors as counsel to the PA and was lulled into thinking the advice was sound when safeguard procedures built into the court system, which he relied upon, failed.

After receipt of respondent's answer dated January 26, 2008, the Committee on Professional Standards served Petitioner with a motion pursuant to 22 NYCRR § 806.5. In support of its motion Respondent annexed Petitioner testimony before the New York State Commission on Judicial Conduct in a proceeding to remove former Kings County Surrogate Michael H. Feinberg. Petitioner's testimony is as follows:

Q. Thank you. Now, at some point in early January, Judge Feinberg appointed you as Counsel?

A. Yes.

Q. He informed you that you were appointed?

A. Yes.

A. He drew a letter, and it was delivered to Hesterberg and Keller telling them that I would be new counsel as of - - I think it was January 6th."

Q. And the appointment was immediate?

A. As of January 6th, yes.

Q. - - as your fee? Thank you. Now, do you now know that SCPA 1108, subdivision 2(c), requires affidavits of legal services to be filed and considered by Surrogates in awarding fees to Counsel to the Public Administrator?

A. Yes.

Q. Between January 1st, 1997, and May 2002, did you do so?

A. No.

Q. Did you submit such affidavits?

A. No.

Q. But you submitted no affidavits?

A. That's correct.

Q. Excuse my English, okay? You submitted no affidavits from the inception of getting the job until and investigation was started by The Daily News?

A. Yes.

Q. Did there come a time when a Daily News article came out on May 13, 2002, about the affidavits and about the 8% fees?

A. Yes.

Q. And did you know about it before it was about to come out?

A. Yes.

Q. For how long?

A. I don't know. A week. Two weeks.

Q. Were changes made concerning what you testified about what the procedures were in this period after the article?

A. We started preparing affidavits in every current case and nunc pro tunc affidavits in past cases.

A. - - in my mind to investigate it, to go over and speak to the clerk. I had a long standing prior vacation planned with the family. I went out of the country to Mexico, where my fourteen year old son was seriously, grievously injured. He fractured his spine and I had to fly him out on a medivac and spend a month in Texas with him at the University of Texas Medical School in - - where was I - - San Antonio, and I was living in and out of - - when we came back - - we had facilities. I took the night shift; my wife took the day shift, and it just escaped me. It just, you know, I didn't do it. I should have done it. I just didn't do it.

Q. Okay. And, now, you got 6% of the value of the estate at the time of the accounting as your fee. What did you get at the time of the final decree that you proposed to the Court?

A. An additional - - not additional 6% on any additional assets and then 2% on the entire estate.

Q. So, you would determine or your office would determine what 8% would be on the new value of the estate, is that correct?

A. Yes.

Q. And would it be fair to say that the way you did this is you put the amount that you were requesting on a post-it note on the proposed decree?

A. My employees did that. It was a long standing practice in the - - going back to my predecessor.

Q. And on the copy you served with the court you put a post-it note with the amount you were seeking?

A. Yes, I believe the request of the clerk and the department - -

> Q. But on the copy that you filed with the court, at the clerk's request of your predecessor, you put a post-it note saying how much your firm was requesting that you'd be earning a total of 8% on the entire amended estate?
>
> A. That's what - - Requesting.

While petitioner states he was unable to appeal the determination reached by the New York State Court of Appeals in *Matter of Feinberg* , 5 N.Y.3d 206, 833 N.E.2d 1204, 800 N.Y.S. 592 (2005) as he was not a party to that proceeding, it should be noted that the Respondent did not rely upon the doctrine of collateral estoppel in its motion pursuant to 22 NYCRR § 806.5. It is obvious that in his Petition, Petitioner is offering explanations for his conduct in the form of mitigation, rather than addressing the substance of the charges against him. Further, the Petitioner raises factual issues in an effort to place his misconduct in context, when in actuality, examination of the record and what was alleged in the charges against him was established to the satisfaction of the Appellate Division, Third Department.

B. Petitioner was afforded due process during all stages of his disciplinary case.

As part of the guarantee of procedural due process, this Court has recognized an attorney in a disciplinary matter is entitled to fair notice of the charge against him or her. *In re Ruffalo*, 390 U.S. 544 (1968). An attorney disciplinary proceeding is an adversary proceeding of a quasi-criminal nature. *In re Gault*, 387

U.S. 1 (1967); *Erdman v Stevens*, 458 F.2d 1205 (2nd Circuit 1972). In any analysis of an alleged procedural due process violation, important consideration should be given to whether the attorney has been afforded fair notice of the charges, an opportunity to explain the conduct at issue and to present a defense to the charges. *In re Oliver*, 333 U.S. 257 (1948). Procedural due process in an attorney disciplinary proceeding does not require that a hearing be given to the attorney, only that there be a fair notice of the charge and an opportunity to explain and defend. *In re Chipley*, 448 F.2d 1234 (1971). The license to practice law in a state is so local in nature that federal constitutional standards have not altered the traditionally wide discretion afforded state courts in the establishment and application of standards of professional conduct with moral character to be observed by their court officers. *Mildner v Gulotta*, 405 F. Supp 182 (E.D.N.Y. 1975); *Erdman v Stevens, supra*. Finally, the provisions of New York Judiciary Law governing disciplining of attorneys have been held not to be violative of due process. *Gulotta, supra*.

It is clear that Petitioner was afforded fair and adequate notice of the charges against him and was provided the opportunity in his answer to articulate his defenses to the charges. The charges were not vague and they provided Petitioner with notice of what particular conduct on his part constituted violations of New York's Code of Professional Responsibility. The Court Rules governing attorney conduct in the Appellate Division, Third Department provide any attorney subject to disciplinary charges with the opportunity to present evidence and call and cross-examine witnesses at a disciplinary proceeding. The rules also provide that

either party may seek an order from the court determining no factual issues are raised and requesting that the case be scheduled for oral argument. There was no abuse of discretion by the Appellate Division in its plenary review of the record and its decision that based upon all evidence presented there was no requirement in these circumstances to appoint a referee to hear testimony and report to the court.

CONCLUSION

Petitioner have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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